STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 18 CVS 014001

COMMON CAUSE, *et al.*, Plaintiffs, v. REPRESENTATIVE DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, *et al.*, Defendants.	**INTERVENOR-DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLARIFICATION PURSUANT TO RULE 45**

NOW COME Defendant-Intervenors Adrain Arnett, Carolyn Elmore, Cathy Fanslau, Connor Groce, Reginald Reid, Aubrey Woodard, and Ben York and, pursuant to Rule 7 of the North Carolina Rules of Civil Procedure, file this Response in Opposition to Plaintiffs' Motion for Clarification Pursuant to Rule 45. In support of their Response, Defendant-Intervenors show the Court as follows:

INTRODUCTION

Rule 45(d1) of the North Carolina Rules of Civil Procedure requires the party issuing a subpoena to notify all other parties of receipt of subpoenaed material, and to "provide all other parties a reasonably opportunity to copy and inspect such material at the expense of the inspecting party." Plaintiffs seek the Court's "clarification" as to whether they are required to comply with this black-letter law, or whether they can selectively filter out materials for production to Defendants,

produced to Plaintiffs pursuant to their subpoena. Plaintiffs' Motion is not about the proper use of the materials they received in the litigation; rather, it is an attempt to prevent Defendants from accessing the same materials that Plaintiffs already have received pursuant to a Rule 45 subpoena.

While Intervenor-Defendants appreciate Plaintiffs' concerns over potentially sensitive information, Plaintiffs cannot prevent the other parties in this action from having an opportunity to inspect and copy the same documents in Plaintiffs' possession which were produced pursuant to Plaintiffs' Subpoena. There is no mechanism in Rule 45 that allows a party to not make materials received pursuant to a subpoena available to the other parties. The legal authority cited by Plaintiffs is inapposite to Plaintiffs' duties under Rule 45(d1) and the procedural posture of their Motion. Plaintiffs must afford all other parties "a reasonable opportunity to copy and inspect such material[,]" and Intervenor-Defendants respectfully request that this Court deny Plaintiffs' Motion and compel Plaintiffs to allow Defendants to "copy and inspect" the material received by Plaintiffs pursuant to the Subpoena.

PROCEDURAL HISTORY

On or about February 13, 2019, Plaintiffs served a subpoena on Stephanie Hofeller Lizon seeking production of certain documents relating to state legislative redistricting, as well as "[a]ny storage device in your possession, custody, or control that contains, or may contain: (1) any and all ESI requested in the preceding paragraphs; (2) and/or any ESI relating to any documents requested in the preceding paragraphs." Plaintiffs' Ex. A, Subpoena to Stephanie Hofeller Lizon, at 5.

In response to Plaintiffs' broad Subpoena, Ms. Lizon apparently produced eighteen flash drives and four external hard drives. Plaintiffs' Ex. B, Email from S. Jones to P. Strach, at 13. Ms. Lizon asserted no objections in response to Plaintiffs' Subpoena. *Id.* at 4.

Plaintiffs informed all other parties of their receipt of the subpoenaed material on March 20, 2019. *Id.* at 14. On March 26, 2019, Legislative-Defendants requested a copy of the materials. *Id.* at 13. In response, Plaintiffs stated that they were still processing the materials and would provide information "about the cost, logistics, and timing of providing" a copy at a later date. *Id.* The following day, on March 27, 2019, Plaintiffs informed all Defendants that the materials contained what appears to be "personal information, such as tax returns and medical and family information," and that Plaintiffs "have not opened any of these files and will not do so." *Id.* at 15. Rather than providing the Defendants with a copy of the materials Plaintiffs received or an opportunity for Defendants to inspect and copy them, Plaintiffs instead proposed to perform a keyword search to filter out information **Plaintiffs** deem "personal information" and provide the filtered results to Defendants for copying and inspection. *Id.*

Both Legislative Defendants and Intervenor-Defendants disagreed with Plaintiffs' proposal and insisted that Plaintiffs comply with their obligation to make the subpoenaed materials available for copying and inspection. *Id.* at 4–5, 7–8. In particular, Intervenor-Defendants noted that "it would be inherently unfair for any party to receive items and information pursuant to a subpoena but then not make

them available to all parties in the litigation," and that N.C. R. Civ. P. 45(d1) allows Intervenor-Defendants to "get access to what [Plaintiffs] received, without filtering." *Id.* at 5.

Rather than providing Defendants with an opportunity to copy and inspect the subpoenaed materials in Plaintiffs' possession, Plaintiffs filed a "Motion for Clarification," seeking the Court's blessing to proceed with their proposed process for filtering out certain subpoenaed documents. As discussed herein, Plaintiffs' proposed procedure is contrary to the North Carolina Rules of Civil Procedure, and their Motion should be denied.

ARGUMENT

I. N.C. R. Civ. P. 45(d1) plainly requires Plaintiffs to provide Defendants with a "reasonable opportunity to copy and inspect" all "material produced in compliance with the subpoena."

The issue before the Court is whether N.C. R. Civ. P. 45(d1) entitles Defendants to copy and inspect the materials that Plaintiffs received from Ms. Lizon, without any filtering of those documents by Plaintiffs prior to that copying and inspection. Rule 45(d1) states that

> [a] party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of material produced in compliance with the subpoena, serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party.

N.C. R. Civ. P. 45(d1). There is no North Carolina case law on point that provides any support for Plaintiffs' interpretation of Rule 45(d1). This is likely because the

meaning of the statute is plain—a reasonable opportunity to inspect and copy the materials must be provided.

It is well-settled that "[i]n resolving issues of statutory construction," North Carolina courts "look first to the language of the statute itself." *Fid. Bank v. N. Carolina Dep't of Revenue*, 370 N.C. 10, 18, 803 S.E.2d 142, 148 (2017) (quoting *Walker v. Bd. of Trs. of the N.C. Local Gov'tal Emps. Ret. Sys.*, 348 N.C. 63, 65, 499 S.E.2d 429, 430 (1998)). "When the language of a statute is clear and without ambiguity, North Carolina courts must "give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Id.* (quoting *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)). The rule here is clear and unambiguous regarding Defendants' opportunity to inspect and copy the exact materials received by Plaintiffs. There is no provision in the rule that allows a party to filter or otherwise limit access to materials received pursuant to a subpoena, especially where the producing party has not objected. Thus, the hard drives and thumb drives produced by Ms. Lizon must be made available for inspection and copying by Defendants.

The case law cited by Plaintiffs, while inapposite to Plaintiffs' position, is nevertheless instructive in the comparisons that can be made with Plaintiffs' conduct here. *Beam ex rel. Mauney v. Beam Rest Home, Inc.*, 2014 NCBC 46, 2014 WL 4748600 (N.C. Super. Sept. 25, 2014), involved a shareholder request for inspection in which the defendant-corporation actually gave the plaintiff-shareholder duplicate copies of documents he requested to inspect. *Id.* ¶¶ 4, 7, 11. Apparently dissatisfied with the

duplicate records, the plaintiff-shareholder pursued a motion to compel, demanding an opportunity to inspect the original records. *Id.* ¶ 12. Judge Bledsoe refused to compel the defendant-corporation to provide an opportunity to inspect the original records, given that there was no reason to suspect the duplicates were not authentic. *Id.* ¶¶ 21–22.

The instant case is distinguishable on at least two different grounds. Unlike the instant case, the plaintiff-shareholder in *Mauney* was actually given authentic duplicates of the records he sought. Here, Plaintiffs patently refuse to provide authentic duplicates of the subpoenaed materials, instead withholding the authentic records until they have adulterated those materials by removing documents Plaintiffs deem irrelevant or nonresponsive.[1] Further, the defendant corporation in *Mauney* actually complied with their statutory duty by producing copies of the records to which the plaintiff shareholder was entitled. Plaintiffs here have not complied with their clear statutory duty under Rule 45(d1) to provide "a reasonable opportunity to copy and inspect" the subpoenaed materials. In short, Plaintiffs cannot claim the same protection as the defendant-corporation in *Mauney* because, unlike the defendant-corporation in *Mauney*, they have provided no opportunities for inspection and copying all of the subpoenaed materials whatsoever.

In *McGurdy Grp. v. Am. Biomedical Grp., Inc.*, 9 Fed. App'x 822 (10th Cir. 2001), defendant American Biomedical Group, Inc. ("AMGI") requested that plaintiff

[1] It must be noted that the hard drives and thumb drives, in their totality, were responsive to Plaintiffs' Subpoena, and Ms. Lizon produced them without objection. If Plaintiffs were really concerned about the breadth of production, perhaps their requests should have been more narrowly tailored.

McCurdy Group ("MG") produce computer disc drives, and to which MG specifically objected as overly broad. *Id.* at 831. AMGI then moved to compel production of the computer disc drives because it could not be certain that MG had produced all relevant material. *Id.* The court refused to compel production of those drives because AMGI could not articulate a sufficient reason for such production beyond their skepticism of MG's compliance with previous discovery requests. *Id.*

Again, the instant case is easily distinguishable. First and foremost, unlike the plaintiff in *McCurdy Grp.*, Ms. Lizon raised no objections to the request for production. She apparently readily produced a number of storage devices responsive to Plaintiffs' broad subpoena. Furthermore, unlike AMGI's attenuated argument for why it had a right to the requested materials, Defendants here have a clear statutory right to the requested materials under Rule 45(d1). Finally, whereas AMGI had no articulable reason for its skepticism of MG's compliance with its discovery obligations, Defendants here have direct admissions by Plaintiffs that they will not comply with their discovery obligations absent a court order. *See* Plaintiffs' Ex. B at 1–2. Furthermore, Defendants have an articulable reason for why they are entitled to the subpoenaed materials—because N.C. R. Civ. P. 45(d1) plainly requires it.

This is a dilemma of Plaintiffs' own making. Plaintiffs could have written a narrowly tailored subpoena and relied on Ms. Lizon to provide the documents they sought. Instead, Plaintiffs chose to request to inspect and copy not just the documents relating to state legislative redistricting, but also any storage device containing either the requested ESI or any ESI relating to those requests. In effect, Plaintiffs refusal

to produce the subpoenaed materials, without narrowing the scope of those materials sought in their own subpoena, is an objection to the scope of their very own request. As a matter of policy, allowing such a position to be taken would permit the very gamesmanship that Rule 45(d1) was intended to eliminate.

Ultimately, Intervenor-Defendants appreciate that there may be some sensitive information on the storage devices produced by Ms. Lizon; however, Intervenor-Defendants are capable of discerning what documents are sensitive and protecting such information as necessary. At the appropriate time, Intervenor-Defendants are willing to address the confidentiality of certain sensitive materials under the Consent Protective Order in this matter. In the meantime, this Court should not set precedent allowing a party to not comply with its obligations under Rule 45(d1) because the subpoena that same party drafted was too broad in scope.

CONCLUSION

WHEREFORE, in light of the foregoing, Intervenor-Defendants respectfully request that Plaintiffs' Motion be denied, and the Court order that Plaintiffs comply with N.C. R. Civ. P. 45(d1) and provide Intervenor-Defendants a reasonable opportunity to copy and inspect all subpoenaed materials in their possession, without any filtering, alteration, modification, or other spoliation of the material received by Ms. Lizon.

This the 11th day of April 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing: INTERVENOR-DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLARIFICATION PURSUANT TO RULE 45 upon all parties to this matter via email to the below listed email addresses as follows:

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